No. 162

IN THE

# Supreme Court of the United States

October Term 1955

EAST TEXAS MOTOR FREIGHT LINES, INC., GILLETTE MOTOR TRANSPORT, INC., JONES TRUCK LINES, INC., AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

FROZEN FOOD EXPRESS, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL., *Appellees*.

**Appeal from the United States District Court for the Southern District of Texas Houston Division**

## BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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### *Cases Cited*



### *Statutes Cited*

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## STATEMENT

Pursuant to Rule 16, Paragraph 3, of the revised rules of this Court, appellants, East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Jones Truck Lines, Inc., American Trucking Associations, Inc., the Common Carrier Conference Irregular Route of American Trucking Associations and the Contract Carrier Conference of American Trucking Associations oppose the motion to affirm of appellees, United States of America and Ezra Taft Benson, Secretary of Agriculture, for the following reasons:

The seemingly narrow question of whether fresh and frozen poultry is a "manufactured" item can be answered properly only in the context of the broader issue of the definition of the term "agricultural (including horticultural) commodities (not including manufactured products thereof)" within the meaning of the partial exemption of Section 203(b)(6) of the Interstate Commerce Act.

Neither the dictionary definition of the word "manufactured" nor the opinions of courts passing on the applicability of taxes or tariffs on manufactured commodities serve to determine the scope of the exemption from the economic regulation of the Interstate Commerce Act afforded by Section 203(b)(6). To say, as the appellees do, that "manufacture implies a change, but every change is not manufacture. . ." is of no help whatever in resolving the issue. To conclude from this nicety of expression, as the appellees have, that "although a chicken admittedly is 'changed' by dressing and freezing, such change is not enough to make it 'a new and different article'; it is still a chicken, albeit a frozen and dressed one," simply serves to confuse it.

The partial exemption of Section 203(b)(6) is intended to facilitate the transportation of agricultural produce. To be sure, it is sufficiently broad to embrace products which have been processed, as ginned cotton or pasteurized milk; however, it does not extend to manufactured commodities which have a farm origin. Freezing, as canning, long has been recognized as such a manufacturing process. That the item manufactured retains its original identity, use and name cannot be so narrowly construed as to obscure the manufacturing process. Beans, when fresh, are deemed to be an exempt agricultural commodity; they become manufactured within the meaning of Section 203(b)(6) when canned or frozen although they retain their original identity, use and name. In the

same way chickens when canned or frozen become manufactured agricultural products under Section 203(b)(6) although they may in fact continue to be chickens.

That fresh and frozen dressed poultry are manufactured agricultural products within the meaning of Section 203(b)(6) has been the consistent, well-established construction of the Interstate Commerce Commission, the agency charged with the enforcement of the Interstate Commerce Act. Such construction, based upon findings of fact, should not be overturned except for the most cogent reasons. Indeed, the appellees, United States of America and Secretary of Agriculture, have acquiesced in this construction of the Interstate Commerce Commission. This is manifest following the participation of the Secretary in several rate proceedings before the Commission in which he urged lower truckload rates on dressed poultry without ever contending that these were exempt agricultural commodities and therefore free from rate regulation.[1] The Department of Justice, on the other hand, through the offices of the local United States Attorneys, prosecuted numerous criminal actions against motor carriers for violating the certificate provisions of the Interstate Commerce Act in connection with their unauthorized transportation of dressed poultry.[2]

The appellees urge that there is no more compelling reason for further review by this Court than there was in *Interstate Commerce Commission* v. *Kroblin*, 113 F. Supp. 599, aff'd., 212 F. (2d) 555, cert. den., 348 U. S. 836, 75 S. Ct. 49. In their jurisdictional statement, ap-

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[1] *Poultry - Delaware to Middle Atlantic States*, I.&S. M-3890, January 14, 1952; *Frozen Foods in Middle Atlantic States*, 53 M.C.C. 117.

[2] *U. S.* v. *S.S.D. Trucking Corp.*, (unreported) U.S.D.C., N.D. Ill., March 31, 1953; *U. S.* v. *Reed Trucking Co., Inc.*, (unreported) U.S.D.C., Del., March 19, 1948.

pellants have asserted, in part, their reasons for disagreeing with the lower courts' decisions in the *Kroblin* case. Given the opportunity, appellants believe that they can demonstrate to the Court that the decisions of the lower courts in *Kroblin* are inconsistent with the literal terms of the statute as well as the legislative history of the Motor Carrier Act as a whole. It should be pointed out, however, that even if the *Kroblin* decision is ultimately approved by this Court, it could not possibly stand as controlling precedent for the action taken by the lower court in this proceeding. This for the reason that the only commodity before the lower court in *Kroblin* was *fresh* New York dressed poultry, whereas in the proceeding below the District Court had before it for determination the additional and vastly different issue as to whether *frozen* dressed poultry came within the exemptive language. It is appellants' contention that without regard to the state of processing of a commodity otherwise, the act of freezing it constitutes "manufacture" as that term is used in the statute. Freezing has an identity of purpose with canning, namely preservation, and both processes have long been held by the Interstate Commerce Commission to constitute manufacture. For example, more than ten years ago, in *Newton Extension—Frozen Foods*, 43 M. C. C. 787, 789 (October, 1944), the Commission, division 5, clearly indicated that neither canned nor frozen agricultural commodities qualified as exempt under §203(b)(6):

> It is clear that agricultural commodities, frozen in the manner hereinabove described, are subjected to a process of manufacture, and that the finished products are as distinct from agricultural commodities as are canned fruits and vegetables, from which both are manufactured.

The identity of purpose of freezing and canning strongly suggests that affirmance of the judgment below will necessarily be followed by exemption from economic and

certificate regulation by the I. C. C. of countless commodities in the fruit, vegetable and seafood field that have been for years conceded to be manufactured, and, therefore, subject to such regulation. That affirmance of the decision below would bring about this result is no groundless fear—in proceedings now pending before the Commission the contention, based upon the decisions of the lower courts in *Kroblin* and the instant proceeding, has been raised that frozen fruits, vegetables and juices,[3] frozen prepared fruits and vegetables, frozen eggs and egg yolks, and frozen prepared fish and seafood products[4] are subject to the §203(b)(6) exemption. Such a broadening of the exempt commodity category, in turn, suggests a complete breakdown of the already largely unsuccessful efforts of the Commission to regulate, for purposes of safety, and otherwise to police the operations of the vast number of so-called exempt carriers engaged in interstate commerce throughout the length and breadth of the land.

This Court should explore the entire question in detail, and it should have the benefit of oral argument and briefs. To be sure, the issue, as here presented, is directly concerned only with the transportation activities of one motor carrier. However, from a practical standpoint determination of the question whether fresh and frozen dressed poultry is a "manufactured" item affects all carriers claiming an exempt status and, as thus magnified, takes on an importance that extends far beyond the immediate problem of whether or not the one motor car-

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[3] Docket No. MC-C-1562—*Home Transfer & Storage Co., Investigation of Operations*, Div. 5, June 30, 1955.—M. C. C.—Respondent's petition for reconsideration now pending.

[4] Docket No. 105782 (Sub. No. 3)—Application of W. W. Hughes d/b/a Hughes Refrigerated Service (Examiner's report not yet issued).

rier can transport fresh and frozen dressed poultry free from economic regulation by the Interstate Commerce Commission.

Even if this Court should ultimately decide not to hear argument or allow submission of briefs on the question of the exempt status of fresh or frozen dressed poultry, it should not dispose of the instant case until the broad issue of the definition of the term "agricultural (including horticultural) commodities (not including manufactured products thereof)" within the meaning of the partial exemption of Section 203(b)(6) is before this Court. The proceedings in the companion case, No. 160, *American Trucking Associations, Inc., et al.* v. *Frozen Food Express, et al.*, potentially present such opportunity. The comprehensive review of the matter of the agricultural exemption that that case may present on remand to the District Court should not be precluded by the unnecessarily speedy decision of this Court in the instant case on the narrow issue of the status of fresh or frozen dressed poultry.

## CONCLUSION

For the foregoing reasons, appellants submit that appellees' motion to affirm should be denied, and probable jurisdiction noted.

Respectfully submitted,

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Due: August 30, 1955

## CERTIFICATE OF SERVICE

In compliance with Rule 33 of the Revised Rules of the Supreme Court of the United States, I, Peter T. Beardsley, one of the attorneys for the several Appellants on whose behalf the foregoing brief in opposition to motion to affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding as indicated below.

This, the 29th day of August, 1955.

PETER T. BEARDSLEY

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